

# The European Court of Human Rights' Jurisprudence on Issues of Forced Disappearances

by Gobind Singh Sethi\*

Forced disappearances may violate numerous provisions of international human rights instruments, including the American Convention on Human Rights (American Convention) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention). The relevant provisions include the right to liberty, the right to be free from torture, inhuman, or degrading treatment, and the right to life. A forced disappearance is a violation of the victim's right to liberty. It is not as clear, however, when the right to life or the right to be free from torture, inhuman, or degrading treatment is violated. According to Amnesty International, the following elements constitute a forced disappearance: "a) a deprivation of liberty; b) by government agents or with their consent or acquiescence; followed by (c) an absence of information or refusal to acknowledge the deprivation of liberty or refusal to disclose the fate or whereabouts of the person; (d) thereby placing such persons outside the protection of the law." This definition is reflected within the jurisprudence of both the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACHR).

Unlike the IACHR, which has been adjudicating claims of forced disappearances for over 15 years, the ECHR has only recently addressed this issue, largely in response to increased allegations of forced disappearances by victims' families against Turkey. Although the ECHR has looked to the IACHR in developing much of its nascent forced disappearance jurisprudence, its jurisprudence on the subject has not been wholly consistent. A comparison of the jurisprudence of the ECHR with that of the IACHR must explore three legal issues common to all forced disappearances. These issues include the legal value of finding a pattern or practice of forced disappearances; the necessary evidentiary burden to establish a violation of the right to life; and the requisite burden of proof to establish a violation of the right to be free from torture, inhuman, or degrading treatment. Presently, the ECHR's jurisprudence is not as responsive to the nature of forced disappearances as that of the IACHR with regard to the issues of establishing a pattern or practice of forced disappearances and the evidentiary burden of proof required to prove a violation of the right to be free from torture, degrading, or inhuman treatment. Regarding the burden of proof required to prove a violation of the right to life, however, the ECHR's jurisprudence is more aligned with that of the IACHR and is more responsive to the nature of forced disappearances.

## The Establishment of a Pattern or Practice of Forced Disappearances

Finding a pattern or practice of forced disappearances is the bedrock of the IACHR's jurisprudence on this issue and steers the rest of the analysis, including the standards of proof for finding a violation of the right to life and the right to be free from torture. This is best illustrated by the IACHR's seminal forced disappearance case, *Caso Velásquez Rodríguez*, which arose out of events in Honduras from 1981-1984. In *Velásquez Rodríguez*, the Inter-American Commission on Human Rights presented evidence to the IACHR on behalf of the applicant (the victim's father), suggesting the Honduran government conducted, or at least tolerated, a pattern or practice of forced disappearance. Such evidence included testimony from victims of arbitrary detentions during the relevant period, interviews with family members whose relatives were disappeared, and general coun-



Memorial Wall to the Disappeared in Santiago, Chile.

try reports produced by independent, non-governmental organizations. From this evidence, the IACHR concluded a pattern or practice of forced disappearance existed in Honduras.

After concluding a pattern or practice existed and was "supported or tolerated" by the government, the IACHR stated that if the applicant could link the disappearance of a particular individual to that practice, then the "disappearance of [a] particular individual [could] be proved through circumstantial or indirect evidence or by logical inference." The value of the IACHR's holding is significant because it lowers the burden of proof for an individual to establish that a forced disappearance occurred. This lowering of the evidentiary burden increases the likelihood of success on the merits.

The ECHR has similarly considered that a pattern or practice of forced disappearances is a cognizable legal issue. Unlike the IACHR, however, the ECHR has yet to find a State Party responsible for a pattern or practice of forced disappearances. This issue arises almost exclusively with the ECHR's treatment of claims brought before the court by Kurds, and was most evident in the 1998 case of *Kurt v. Turkey*. In *Kurt*, the applicant (the victim's father) introduced reports produced by the UN Working Group on Enforced and Involuntary Disappearances, including a 1994 report indicating Turkey had the highest number of alleged forced disappearance cases of any country in the world. Strikingly, even with such credible evidence, in paragraph 169 of its opinion, the ECHR concluded the report did not establish a pattern or practice of forced disappearances.

The ECHR's handling of this question was inadequate in two ways. First, the ECHR's analysis of the evidence presented was cursory. Only two paragraphs, 168 and 169, were dedicated to determining whether a pattern or practice of forced disappearances existed, and the decision did not address why the 1994 UN report was insufficiently suggestive or reliable. Second, the ECHR did not give any guidance as to what evidence would be necessary to establish a pattern or practice. Rather, the court simply stated the evidence presented was not sufficient to establish a practice or pattern.

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### The Requisite Burden of Proof for a Violation of the Right to Life

Based on the IACHR's finding of a pattern or practice presumption, as indicated above, the evidentiary burden to establish a violation of the right to life is less than proof beyond a reasonable doubt, though the IACHR has not articulated a particular standard for this lesser burden. Most forced disappearance cases, however, arise in the context of a pattern or practice.

In *Velásquez Rodríguez*, the IACHR addressed the burden of proof required in forced disappearance cases where a pattern or practice was established. The discussion focused on the fact that in cases of forced disappearances, the government involved likely would "attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim." The government's concealment or destruction of direct evidence, namely a body, renders it virtually impossible to prove a violation of the right to life. Thus, recognizing that direct evidence would almost always be unavailable to establish a violation of the right to life, the IACHR permitted a finding of violation of the right to life based exclusively on circumstantial evidence, or even logical inference.

In *Velásquez Rodríguez*, the IACHR relied on circumstantial evidence, including hearsay testimony by the victim's sister, who testified that eyewitnesses saw Manfredo Velásquez kidnapped by men in civilian clothes in broad daylight. The IACHR acknowledged that when the Honduran government carried out or tolerated forced disappearances, the police customarily use this form of kidnapping. Consequently, the Court presumed Velásquez disappeared at the "hands of or with the acquiescence of those officials with the framework of that practice." Moreover, the fact that the government failed to investigate or make any inquiry into his disappearance, and thwarted attempts by the victim's family to do so, strongly suggested the government's involvement in the disappearance, even if there was no direct evidence indicating the government kidnapped Velásquez. Finally, because Velásquez had not been seen for over seven years, the IACHR reasonably concluded that Velásquez could be presumed dead. Although the IACHR did not name the evidentiary burden for establishing a violation of the right to life, proof beyond a reasonable doubt was not required as indicated by the IACHR's use of circumstantial or indirect evidence, as well as logical inferences, to hold Honduras in violation of the victim's right to life.

Until 2000, the ECHR required an applicant to prove beyond a reasonable doubt that the victim had died before the court would find a violation of the right to life under Article 2 of the European Convention. In 2000, however, the ECHR decided *Timurtas v. Turkey*, which altered the jurisprudence of the court by permitting a lesser evidentiary burden in cases of forced disappearances. The ECHR dismissed the need for direct evidence previously held necessary in *Kurt*, and instead permitted the use of circumstantial evidence to establish a violation of the right to life, stating that "whether the failure on the part of authorities to provide a plausible explanation as to a detainee's fate, in the absence of a body, might raise issues under Article 2 of the Convention will depend on the circumstances of the case, and in particular on the existence of sufficient circumstantial evidence, based on concrete elements, from which it may be concluded to the requisite standard of proof that the detainee

must be presumed to have died in custody." Although the ECHR never explicitly stated that it rejects the beyond a reasonable doubt standard for an Article 2 violation, unlike in *Kurt*, it never mentioned the beyond a reasonable doubt standard in *Timurtas*. Moreover, its willingness to rely exclusively on circumstantial evidence also signals a departure from *Kurt* and the beyond a reasonable doubt standard.

This new approach by the ECHR was affirmed on February 27, 2001, in *Çiçik v. Turkey*. In *Çiçik*, the ECHR held that circumstantial evidence would suffice for finding a right to life violation. The question for litigators that arises from *Timurtas* and *Çiçik* involves a determination of what is required under the new evidentiary burden to find a violation of the right to life. *Timurtas* sheds some light on what is required of an applicant to find a violation of the right to life based on circumstantial evidence.

In *Timurtas*, the victim's father brought a claim against Turkey for numerous violations of the European Convention, including the right to life (Article 2) and the right to liberty and security of person (Article 5). The applicant contended that on August 14, 1993, *gendarmes* apprehended his son, Abdulvahap Timurtas. At the time the petition was filed in southeast Turkey nearly six and one-half years later, Timurtas was still missing. According to the applicant, *gendarmes* first detained Timurtas and then transferred him to another detention facility. Although there was no eyewitness evidence of the apprehension

or subsequent detention, the applicant presented evidence corroborating his version of events, including a photocopy of a post-operation report signed by the commander of *gendarmes* operations in Silopi, Turkey. The report was dated August 14, 1993, marked with a reference number, and catalogued the series of events that transpired on that day. These events included a description of Timurtas' arrest and

the results of a subsequent interrogation that occurred while Timurtas was in detention. Timurtas' interrogators accused him of being a leader of the Kurdish Worker's Party (PKK) in the Silopi region.

Based on the above facts, the ECHR concluded the circumstantial evidence was sufficient to find that Turkey violated the victim's right to life. In reaching its determination, the ECHR distinguished *Kurt* by indicating three specific facts that were present in *Timurtas*, and not in *Kurt*, which facilitated a finding of a violation of the right to life in light of the general context of the political situation in southeast Turkey. First, in *Timurtas*, there was credible evidence that the victim was taken to a detention facility. It is not enough, as in *Kurt*, that the victim was last seen surrounded by soldiers, even if he was seen leaving with them. Evidence that the victim was taken to a detention facility is required. Second, there must be reliable evidence indicating why the authorities would want to detain the victim. In *Timurtas*, it was established that the authorities believed the victim was affiliated with the PKK, thus demonstrating the Turkish authorities had reason to kidnap the victim. In *Kurt*, there was only minimal evidence in the record indicating the Turkish authorities had a motive in detaining the victim. Third, enough time must have lapsed since the disappearance for the victim to be presumed dead. In *Timurtas*, six and one-half years had passed since the victim was last seen, while in *Kurt* only four and one-half years had passed.

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The effect of the *Timurtas* decision is that if circumstantial evidence exists establishing these three facts, the ECHR would be willing to hold a State Party in violation of the right to life. The ECHR used these three facts subsequently in *Çiçik* to hold that Turkey once again violated the victim's right to life.

Consequently, although *Timurtas* and *Çiçik* lowered the evidentiary burden to prove a right to life violation, it is still unclear to what degree this burden has dropped. Because the ECHR appears to require the three *Timurtas* factors, the burden of proof is still very high and is not an adequate response to the crime of forced disappearances. This largely is because of the difficulty complainants face in establishing the first of these factors—credible evidence that the victim not only was apprehended, but also was taken to a detention facility. In *Timurtas*, the victim's father was very fortunate to discover the report indicating *Timurtas* was not only taken to a detention facility, but also detained. In most cases, however, it is highly unlikely that the person bringing a claim would be able to find such a report, because in forced disappearance cases the perpetrators likely will attempt to destroy or conceal evidence of the crime. Therefore, requiring a party to produce such an item, or similar evidence, to find a violation of the right of life would, in reality, be comparable to keeping the evidentiary burden near proof beyond a reasonable doubt. Such an approach by the Court would reward perpetrators for destroying evidence that could be used in finding a right to life violation.

#### The Right to be Free from Torture, Inhuman, or Degrading Treatment

The reasoning the IACHR employed in *Velásquez Rodríguez* on the issue of the evidentiary burden required to prove a violation of the right to life in forced disappearance cases is directly applicable to claims of torture or cruel, inhuman, or degrading treatment under Article 5 of the American Convention. An applicant can establish the victim suffered torture based on "circumstantial or indirect evidence or even by logical inference."

In contrast, although the ECHR has removed its beyond a reasonable doubt standard for violations of the right to life, it has not discharged this burden for an applicant who attempts to hold a State accountable for violating the right to be free from torture under Article 3 of the European Convention. In *Çiçik*, the ECHR squarely addressed the issue of the evidentiary burden required to establish a claim of torture. The Court stated that the standard of proof for finding the victim suffered torture or

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cruel, inhuman, or degrading treatment was not established beyond a reasonable doubt. Because the applicant did not introduce any "direct evidence that her sons were indeed the victims of ill-treatment," the Court found that the applicant did not meet the requisite evidentiary burden.

The ECHR's employment of proof beyond a reasonable doubt to establish a claim of torture raises numerous concerns in light of the objectives of international human rights law,

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especially the applicability of such law in the context of forced disappearances. There are two concerns that warrant attention. First, in forced disappearance cases, as stated by the IACHR in *Velásquez Rodríguez*, the government likely will attempt to conceal or destroy the pertinent evidence. Consequently, any direct evidence of the victim's fate will be sparse, thus rendering it virtually impossible to prove beyond a reasonable doubt that the authorities tortured the victim.

Second, as the IACHR emphasized in *Velásquez Rodríguez*, "international protection of human rights should not be confused with criminal justice." An international human rights proceeding is civil rather than criminal in nature. The objective of international human rights law, as noted by *Velásquez Rodríguez*, is not "to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for reparation of damages resulting from the acts of the States responsible." These objectives are identical to those in any civil proceeding. Therefore, the evidentiary burden required in most civil claims—proof by a preponderance of the evidence—should be utilized in human rights courts. Ironically, the ECHR's use of the reasonable doubt standard for torture claims has the effect of encouraging perpetrators to destroy evidence of torture. By eliminating the direct evidence, a State could shield itself from liability before the ECHR.

#### Conclusion

At present, the ECHR's forced disappearance jurisprudence is not as well developed as the jurisprudence of the IACHR. The ECHR analysis of the issue of a pattern or practice in *Kurt* suggests that it is unwilling to find a pattern or practice of forced disappearances even if evidence presented suggests that one exists. Moreover, the ECHR's use of proof beyond a reasonable doubt as the necessary evidentiary burden the applicant must overcome to prove a violation of the right to be free from torture is inappropriate and counters the civil nature of human rights proceedings. As stated by the IACHR in *Velásquez Rodríguez*, "States do not appear before the Court as defendants in a criminal action." The goal of the adjudication is to compensate the aggrieved party and not to punish the individual, thereby eliminating the need to use the evidentiary burden of proof beyond a reasonable doubt. There are, however, some positive signals for the ECHR's future adjudication of these issues based on its recent decisions in *Timurtas* and *Çiçik*. The ECHR has moved away from requiring the proof beyond a reasonable doubt standard to establish a violation of the right to life. It need now only lower the evidentiary burden for torture claims, and be more willing to recognize the existence of a pattern or practice of forced disappearances when one exists. ☺

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